by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the consideration that the party either did not understand what he was about or was the victim of some imposition.' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition.'"

In *Kedari Bin Ranu* v. *Atmarambhat* [3] Westropp C.J. said:—

"Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it. Inadequacy of consideration, when found in conjunction with any other such circumstances as suppression of the value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them."

Mr. Yeap himself admitted that if there was consideration then inadequacy of consideration is immaterial.

Section 25 of the Indian Contract Act is identical with section 26 of our Contracts Ordinance. Here there was no evidence of duress or fraud.

In the circumstances I would allow the appeal with costs. The cross-appeal by the respondent is dismissed.

The order of the learned judge is set aside. There will be judgment for the appellant in terms of the counterclaim with costs.

Thomson L.P. and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

Solicitors: *Dharmananda & Co.*; *Yeap & Yeap.*

TANG SIEW HEE & ORS. v. HII SII UNG

[O.C.J. (McGilligan J.) December 7, 1963]

[Sibu — Civil Suit No. 68 of 1963]

Bill of exchange — Claim on promissory note — Promissory note executed because of hwei transactions — Want or failure of consideration — Nature of hwei — Method of operation.

Evidence — Oral evidence to vary written document — Evidence Ordinance, (Sarawak Cap. 54), ss. 93 and 94.

Gaming — Gambling contract — Hwei — Nature and method of operation.

The plaintiffs claimed the sum of $3,356 on a promissory note signed by the defendant which alleged a loan to the defendant by the plaintiffs. Oral evidence was given that the sum represented amounts due from him as the head of a *hwei* which he ran in 1962 and that the defendant had in fact never received the loans from the plaintiffs.

Held: (1) the oral evidence was admissible under the proviso to section 94 of the Evidence Ordinance to show that there was a want or failure of consideration;

(2) as such evidence showed that the consideration shown in the promissory note and alleged by the plaintiffs was non-existent, the plaintiff's claim must fail.

Nature and method of operation of *hwei* explained.

CIVIL SUIT.

Plaintiffs in person.

C. T. Wong for the defendant.

Cur. Adv. Vult.

McGilligan J.: The plaintiffs' claim is an apparently simple one for "judgment in the sum of $3,356 being money lent to the defendant at his request". It is based on what is called a promissory note, dated 12th November 1960, which was (undisputedly) signed by the defendant. In their plaint, or statement of claim, the plaintiffs put their case in the following way:—

"1. On or about 12th November, 1962, the plaintiffs lent and advanced to the defendant at his request a sum of $3,356 (dollars three thousand three hundred and fifty six only) which sum the defendant promised to repay without demand on or before 12th May, 1963.

2. On the same day the defendant executed one promissory note in favour of the plaintiffs. Such transaction was made in the presence of Headman Wong Kie Sieng.

3. Despite repeated demands made by the plaintiffs against the defendant for the payment of the said sum, the defendant refused and still refuses to pay the same."

The document on which the plaintiffs rely is written in Chinese characters. The English translation of it reads —

"Promissory Note is hereby made by HII SII UNG (I/C No. 222100) who has borrowed from Tang Siew Hee, Wong Liong Nung, Lau Yong Ping and Tiong Chuo Kiew the sum of Dollars three thousand three hundred and fifty six only (without interest). The repayment period falls on 12th day of May, next year. Sii Ung agrees to deposit, as security, the two titles of his own rubber gardens O.T. No. 20346 and O.T. No. 12263 totalling six acres. Should the repayment is not made on the expiration of the term specified there is no objection for the lenders to apply to court for auction of the said land in settlement of the said loan. Words of mouth show no proof and therefore Promissory Note is herewith prepared for reference.

Borrower: (Sgd.) Hii Sii Ung

Witness: (Sgd.) Wong Kie Sieng
(Stamped with the Seal of Headman Area No. 6 Wong Kie Sieng)

Written by: (Sgd.) Wong Kwong Hui."

This translation (Exhibit 2) was accepted by both parties as correct, except in one point, on which the court heard evidence from the court interpreter. It appears that in the Chinese original the word "DEN" is written after the names of the four plaintiffs. According to the interpreter, as I understood his evidence, "DEN"

when it comes after more than one name usually means something like "collectively" or "taken together". If that be its meaning here, there is no need for "DEN" to be literally translated into English, as it would be somewhat redundant. "DEN", however, can have another meaning — more usual, I gathered, when used after one name only — of "and others". If this be its meaning here (it is the one the defendant would ascribe to it), then the English translation of the vital document is faulty inasmuch as the words "and others" should, but do not, appear after the name Tiong Chuo Kiew. The court will not at this stage express any opinion on this point.

The first plaintiff was the only one of the plaintiffs to give evidence. I am not making an adverse comment, I am merely stating the fact. He said this: on the afternoon of 12th November last year he was asked by the defendant for a loan of $1,000, and he lent $1,000 to him the same day in his own house (only the two of them being present at the time); on the evening of the same day he went, at the defendant's request, to the house of the area headman, Mr. Wong Kie Sieng, "to make a written agreement as security for the loan"; there at Mr. Wong's house the required agreement (Exhibit 1) was executed, that is, was signed by the defendant as borrower, by Mr. Wong Kie Sieng as witness, and by the latter's son, Mr. Wong Kwong Hui, as the one who had written out the agreement. At the same time the defendant handed over to the second plaintiff two documents of title as security for repayment of the loan, the total loan of $3,356, made up of $1,000 from the 1st plaintiff, $1,000 from the second plaintiff, $956 from the third plaintiff, and $400 from the fourth plaintiff. The first plaintiff also said that in 1962 he had been a member of a "hwei" (what a "hwei" is will be later discussed) which was run or managed by the defendant; but he denied (emphatically) that the agreement, Exhibit 1, had any connection with "hwei" transactions; it was, he said, a separate independent matter and was simply a promissory note made on the 12th of November 1962 promising to repay by the 12th of May 1963 money actually lent.

Mr. Wong Kie Sieng, area headman, gave evidence to support the plaintiffs' claim. In the course of his non-committal and cautiously given evidence, he corroborated the first plaintiff's statements as to the drawing up and signing of the document, the agreement, and as to the handing over of the documents of title. He never said explicitly what the agreement was, but his position is clear from the following quotations from his evidence:—

"Defendant came to my house to talk about an agreement in respect of a 'hwei'. I told him, being area headman, I do not interfere in matters of 'hwei'. I said I do not make 'hwei' documents for people. What I make for people is a promissory note concerning money lent."

"I never discussed 'hwei' matters with defendant and plaintiffs.

....

I never dictated anything to my son to take down in connection with a 'hwei' matter."

"Defendant told me the document made is in respect of loans. I knew nothing about 'hwei' affairs."

The third and last witness for the plaintiff was Mr. Wong Kong Hui, son of Mr. Wong Kie Sieng. He said he prepared the promissory note or agreement, Exhibit 1, on the evening of the 12th of November, 1962, according to his father's instructions. He also corroborated the first plaintiff on the signing of the document. He denied knowing anything about any "hwei" transactions, and denied having seen certain "hwei" documents which were put him in cross-examination. He agreed making on the same evening at the defendant's request another document (produced as Exhibit 9), which he said "speaks of a debt owed to various persons". He denied making calculations to arrive at the figures set out in Exhibit 9. He said all that he did was to write out what is in it. He said he wrote it later, after the agreement, Exhibit 1, had been made.

The plaintiffs' case in evidence did not differ from that made by their statement of claim; references to "hwei" transactions were made, which naturally do not occur in the statement of claim, but they were made because of the line taken by the defendant in his written defence and in cross-examination. Their case is that this is a simple matter of a loan of $3,356 made by the four of them to the defendant, $1,000 of it lent — according to the 1st plaintiff — on the 12th of November, 1962, and all of it lent — according to the statement of claim — "on or about the 12th of November", and of a promissory note signed by the defendant as security for the repayment of that loan. It is the plaintiffs' case that the making and signing of the agreement concerns only a straightforward transaction of loan, and has nothing to do with "hwei" or "hwei" transactions.

In his written defence the defendant makes the case that he was never lent $3,356 by the plaintiffs at any time. He admits owing them some money (He puts it at $436 in his written defence) but denies receiving even that sum by way of simple loan. He avers that the debt arose out of "hwei" transactions carried on by him in 1962; that as a result of the operation of three "hweis" — of which he was the head or manager and the four plaintiffs and many others members — he and several others now owe between them to the plaintiffs and six others a total sum of $3,355.55. There is no denial in the written

defence of the making, and signing by the defendant, of the agreement or promissory note, but there is in effect a denial of the existence of the consideration alleged by the plaintiffs for it.

Before turning to the defendant's evidence it is convenient here to consider briefly the nature of a "hwei". No evidence of its nature was given in this case, but the court is fully cognisant of "hweis" and knows "hwei" transactions to be common business (if that is the right adjective) transactions in Sibu and Sarawak. A "hwei" is an association of persons for the mutual and, in a sense, reciprocal borrowing and lending of money amongst themselves. How one is operated is now to be explained.

Suppose a man called A to have decided to run a "hwei". He gets, say, nine other persons called B, C, D, E, F, G, H, I and J, to join in. There are therefore 10 members of the "hwei", A being both a member and the head or manager of the "hwei". His function is to organise it and administer its operation. Suppose also the working sum agreed upon is $100.

To begin with A, as head, receives from each of the other 9 members $100, $900 in all. To each of them he gives a paper signed by him. This paper is usually called a promissory note, but it is in fact more like a receipt or i.o.u. It is at any rate an acknowledgment of the receipt of money; in this hypothetical case of $100.

In the first month of the "hwei" the other members, B to J, may tender for the right to receive the capital sum that month. The tenders are made to A, and consist in offering to pay so much interest on the loan to be made by each other member. Each tender is in effect (though it is called a tender of interest) an offer to pay back $100 to every other member in return for a smaller (often a considerably smaller) sum.

Suppose that, in the first month, B is the successful tenderer. He makes the offer of the highest interest, an offer of $40; that is, he offers to pay back $100 for every $60 lent to him. B then recevies 8 times $60, or $480 (for which he will eventually have to pay back $800), plus $100 from A, in repayment of his original loan to A. B therefore gets a lump sum of $580, for which his eventual total outlay will be $900. In return for each $60 given him B issues a written acknowledgment, signed by him, of the receipt of $100, and returns to A the written acknowledgment given by A to him.

It is A's duty to obtain these receipts (as I shall now call them) from B, to collect from each other member $60 and give him one receipt, and to hand the capital sum of $580 to B. It is for receiving the tenders and carrying out this monthly duty that A is given the original, interest-free, loan of $900.

In the second month the second tendering occurs. B, having been once successful, cannot tender again, unless, as is not so in this hypothetical "hwei", he had bought two or more shares, not just one; that is, if he had given to A, at the beginning, two (or more) loans of $100. He could then tender successfully once in respect of each share bought, or loan given.

Suppose that, in the second month, of the remaining eligible tenderers C is successful. He tenders $50 interest; i.e. agrees to pay back $100 for each $50 lent. He receives 7 times $50, or $350, *plus* $100 from A and $100 from B. He gets a total of $550 for which his eventual outlay will be $860; i.e., $60 to B and $100 to each of the others. In return for each $50 lent him he issues a receipt for $100, and also gives back to both A and B the receipt for $100 which each of them, respectively, had given him.

And so it goes on (in this hypothetical "hwei") to the end, until in the eighth month there are only two members eligible to tender. One, a man called I, tenders $10. He receives a loan of $90 from J, who has as yet not successfully tendered, and gives him a receipt for $100. He receives from each of the other members (including A) $100 each, a total of $800, and returns to each of them the receipt for $100 before given by each of them to him.

Finally J, who may never have tendered at all (wishing to make money and not to borrow it) will get a total sum of $900, for which his outlay will have been much less; as little, perhaps, as $600 or $700.

After that discourse on the nature of a "hwei" I now return to the defendant's case. Fundamental to it was the paper, or document, produced as Exhibit 9. The translation of that paper reads as follows:—

"Tang Siew Hee	$351.70	
Wong Kee Mee	$590.05	$64 by way of taking timber amounting to 20 logs.
Yong Ngu Kiik	$132.60	
Hii Siew Ing	$132.60	
Tiong Chuo Kiew	$477.60	
Wong Liong Nung	$477.00	
Lau Yong Ping	$477.60	
Ting Kin Chew	$238.80	On the 18th day of May paid to Ting Kin Chew the sum of $280 in payment of interest for the ten persons herein mentioned Witness Wong Ba Hoe.
Lau Kee Kong	$238.80	On the 15th day of May received $20.
Lau Phang Ding	$238.80."	

The names of the four plaintiffs appear on this paper, and the total of the figures immediately opposite those names is $3,355.55.

The defendant led evidence, documentary and oral, proving conclusively that in 1962 he ran, was the head of, three "hweis", of one or the other of which each of the persons named in Exhibit 9 was a member (some were members of more than one).

It is clear, and the court holds, that each of these "hweis" collapsed, came to a premature end, in the first half of October 1962. There had then in each case been four tenderings (all the "hweis" started in June 1962) and four successful tenderers. On no occasion in any of the "hweis" had any of the 10 persons (the four plaintiffs and six others) named in Exhibit 9 been a successful tenderer. It therefore follows, and the court holds, that in October 1962, after the last successful tenders had been made and the appropriate monies collected from the various members, the four plaintiffs and the other six persons named in Exhibit 9 were all creditors in respect of these "hweis", each of them being owed money both by the defendant as head of, and by the successful tenderers in, the "hwei" or "hweis" of which he or she was a member.

It now comes to this: Was the document, Exhibit 1, of November the 12th 1962, drawn up, and signed by the defendant, as a result of a straight-forward loan to him, unconnected in any way with "hweis", or because of these antecedent "hwei" transactions?

It might have been argued (though it was not) that in allowing the evidence concerning "hwei" transactions and in formulating this question the court has overstepped the limits set, in respect of the exclusion of oral by documentary evidence, by sections 93 and 94 of the Evidence Ordinance. The parts of those sections relevant to such an argument read as follows:—

"93. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. . ."

"94. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to or substracting from its terms. . ."

That argument is, however, swiftly refuted by the first proviso to section 94 itself, which proviso reads as follows:—

"(a) Any fact, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration or mistake in fact or law, may be proved if that fact would invalidate any document or would entitle any person to any decree or order relating thereto;"

In effect, the defence case (or a major part of it) here is that there was a complete want of the consideration alleged by the plaintiffs, and therefore such a want of consideration as invalidates the agreement, Exhibit 1, and it is plain that under proviso (a) to section 94 of the Evidence Ordinance evidence attempting to support that case is admissible.

I repeat the questions already put: Was the document, Exhibit 1, of November the 12th 1962, drawn up, and signed by the defendant, as a result of a straightforward loan to him, unconnected in any way with "hweis", or because of these antecedent "hwei" transactions? There is no doubt in my mind that the answer is that it was made and executed because of, and arose out of the , "hwei" transactions in 1962 involving the defendant, the plaintiffs and many other persons.

I say that is the answer for the reasons following. First, I believed the defendant. I found him a most impressive witness, open and plainly truthful except in one thing. I accept all his evidence as correct except for this, that I do not believe that he signed the document, Exhibit 1, without knowing reasonably well what its contents were; I do fully believe, however, that he regarded it as an evolved part of all the "hwei" transactions, and never for a moment intended that it should be taken for the purposes of the moment (a fiction taken by agreement as a fact) that he had received loans from the four plaintiffs amounting in all to $3,356.

Secondly, I did not believe the first plaintiff and the other witnesses for the plaintiffs. There was no acceptable evidence from anyone of the alleged loans from the last three plaintiffs; and as to the first plaintiff's own alleged loan, it is highly unlikely that someone in his circumstances and with his earnings could have amassed $1,000, or if he had amassed such a sum, that he would casually lend it, without interest, more or less as soon as asked. Mr. Wong Kie Sieng was very grudging with his evidence, was clearly determined to be as non-committal as possible, and seemed unable or unwilling to say anything very positive. His son, Mr. Wong Kong Hui, was very ill at ease in the box; he was definitely lying, lying against his will, in my opinion. He was quite unconvincing about making Exhibit 9 after Exhibit 1, and in his denial of knowledge of the "hwei" documents put to him.

Lastly there is the very great probability of

the defendant's story being true. There is the very near coincidence of the figure in Exhibit 1, $3,356 with the total of the figures in Exhibit 9, $3,355.55. There is the fact that the four plaintiffs (with the other 6 persons named in Exhibit 1) were then because of the previous "hwei" transactions all owed money by the defendant and the successful tenderers in the three "hweis". There is the obvious fact (there is no other even possibly acceptable explanation) that Exhibit 9 was made before, and as a prelude to, Exhibit 1.

The court accordingly holds that Exhibit 9 sets out the particulars of the total monies owed by the defendant and the successful tenderers in the three "hweis", between them, to the four plaintiffs and the other six persons named. It also holds that there was no loan and were no loans on (or about) the 12th of November 1962 to the defendant by the four plaintiffs, or any of them.

It follows that the plaintiffs have totally failed to prove a fundamental part of their case, the consideration for the alleged contract to repay. Exhibit 1 is on its face a promissory note, which in addition to the promise to pay on a certain date shows the consideration for the promise and contains an agreement to deposit title as collateral security. The consideration shown in the note, and alleged by the plaintiffs, has been held by the court not to exist, and the plaintiffs' claim fails.

The plaintiffs' claim is dismissed, with costs to the defendant. Costs to be taxed.

Claim dismissed.

TINIT & ORS. v. PUBLIC PROSECUTOR (No. 2)

[A.Cr.J. (McGilligan J.) February 8, 1964]

[Sibu — Criminal Appeal No. 17 of 1963]

Evidence — Retracted Confession — Accomplice evidence — Corroboration — Penal Code, s. 380.

In this case the accused persons were charged with theft alternatively dishonestly retaining stolen property. One of the accused pleaded guilty and his plea was accepted and he was convicted. Later he gave evidence for the prosecution. Some of the accused made confessions in cautioned statements to the police but at the trial all except one retracted their confessions. The appellants appealed against their conviction and the main ground of appeal was that the learned magistrate had failed to direct himself that it was unsafe to convict a person on the uncorroborated evidence of an accomplice and also as to what constituted corroboration in law.

Held: (1) as the learned magistrate, who was a legally qualified stipendiary magistrate, considered that there was no corroboration in this case there was no arguable reason for saying that he should have directed himself as to the kind of corroboration required;

(2) the fact that a voluntary confession is later retracted at the trial does not detract very much from its weight, once it has been accepted that it was made completely voluntarily;

(3) there was in this case corroborative evidence in the confessions, voluntarily made, even though they were subsequently retracted;

(4) the learned magistrate was prepared to convict on the uncorroborated evidence of the accomplice and the court saw no reason to hold him wrong in doing so.

[**Editorial Note:** This report is concerned with that part of McGilligan J.'s judgment on retracted confession and corroboration of accomplice's evidence. The concluding part of his Lordship's judgment dealing with Prison Rules has already been reported, *ante*, p. 151.]

Cases referred to:—

(1) *Sinaraju* v. *Public Prosecutor* [1961] M.L.J. 33.

(2) *Yap Seow Keng* v. *Public Prosecutor* [1947] M.L.J. 90.

(3) *Sayang bin Osman* v. *R.* [1956] S.C.R. 113.

MAGISTRATE'S CRIMINAL APPEAL.

C. T. Wong for Bendinang, Miring, Kalang and Gindi.

The other appellants in person.

J. W. Williams (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

McGilligan J.: The ten appellants and another man called Nyaru anak Nuin were charged on the 8th of October 1963 on the following charges:—

"That you, between the 15th day of September, 1963 and the 17th day of September 1963, at Oya Road, Sibu, committed from a building used for the custody of property, the theft of merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, by dishonestly taking the said property out of the possession of HO CHIN SOON (m) and you thereby committed an offence punishable under section 380 of the Penal Code.

Alternatively

That you, between the 15th day of September, 1963 and the 18th day of September, 1963, dishonestly retained stolen property, to wit, merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, belonging to HO CHIN SOON (m), which said property you knew or had reason to believe to be stolen property, and you thereby committed an offence punishable under section 411 of the Penal Code.".

All 11 accused (the 10 appellants and Nyaru) claimed trial on both charges.

The trial began on the 4th of November 1963. During the course of the case for the prosecution Tinit anak Atap, the first appellant, changed his plea to one of guilty and his plea was accepted by the court. He was therefore convicted and sentenced to fifteen months' imprisonment. Later he gave evidence for the prosecution.

At the close of the prosecution case Nyaru anak Nuin was acquitted, and he is not concerned in this appeal.

The other nine appellants, appellants number